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Brief of Ewing for
Term No. 908.

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(Case No. 16347.)

In the
United States Supreme Court,
October Term, 1897.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Plaintiff-in-Error*
VERSUS

ALEXANDER REEDER, *Defendant-in-error.*

Error to United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR DEFENDANT-IN-ERROR,

—BY—

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ALEXANDER REEDER, *Defendant-in-error.*

Error to United States Circuit Court of Appeals, Fifth Circuit.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of the Case.

The defendant-in-error, Alexander Reeder, was the shipper from Scottsville, Kansas, to Houston, Texas, of a car-load of stock, consisting of three horses, two mules and five cows, a lot of household goods being also carried in the car; he accompanied the stock, riding in the car with them, and sleeping in course of transit on a suspended cot. This was usual, and was done with the acquiescence of the conductor and train crew, though they appear to have invited him to occupy the caboose. The defendant-in-error rode on a drover's pass that appears to have been attached to the bill of lading, and to have formed a part of its consideration. In the course of transit, the stock passed over the railroad of the plaintiff-in-error, one of the connecting lines, from Texarkana to Longview, Texas. The stock reached Texarkana in good condition.

While there was a conflict in the evidence, that for the defendant-in-error was positive to the effect that, on the plaintiff-in-error's line of road, after leaving Texarkana, the cattle and horses were thrown down a number of times, through sudden and unnecessary jerks made by the engine, and that this continued, notwithstanding remonstrance and notice by defendant-in-error to some of the train crew; that in the afternoon of the third day of the journey, to wit: October 25, 1894, the train, on reaching a steep grade near Longview, was subjected to such terrible jerks and jars, repeatedly made, that the halters which held the horses were broken and several of the cows thrown down with the horses on top of them, and while the stock were in that condition, defendant-in-error undertook to give assistance to them lest they be killed, climbing with a view to safety in a trough several feet from the floor, and holding to the side of the car. Being in that position, the verdict affirms upon a conflict of evidence, that while defendant-in-error was thus, in a prudent and careful manner, attempting to give needed assistance to the stock, the train gave a sudden and unusually hard jerk, or jolt, or bumping of the car in which he was riding, through the negligence of the operatives of the train, in consequence of which the plaintiff-in-error, while holding on to an iron on the side of the car, had his right arm pulled out of socket at the shoulder, causing the muscles to perish away, producing partial paralysis, and inflicting upon him permanent and painful injury, for which, on the

trial, to wit: February 4, 1896, the jury awarded as compensation the sum of \$1500 (Rec., 10, 13, 15, 16, 18-20, and 9-10).

The stock contract imposed the risk and duty upon defendant-in-error of giving all needed attention to the stock, including "feeding, watering, bedding, and otherwise caring for the live stock covered by this contract while in cars; and it is provided that the person in charge of the stock should remain in the caboose car attached to the train while the same is *in motion*" (Paragraphs 3 and 9 of contract, Rec., 21, 22). A witness for plaintiff-in-error testified that it was customary for the man in charge of stock, "when the train stops, to go out and look after his stock" (Rec., 20, line 10). While there was some conflict, the positive evidence for the defendant-in-error was, that he never tried to get his cattle up while the train was in motion, but waited until the train stopped, and could not have gotten them up while the train was in motion by reason of the narrowness of the trough in which he was standing (Rec., 25).

The court held, as matter of law, that defendant-in-error could not recover if he was assisting his cattle *while the train was in motion*, but that, if he was not, and was injured while, in a prudent and careful manner, attempting to give the stock needed assistance, through the negligence of the train's operatives, by a sudden and unusually hard jerk or jolt or bumping of the car in which defendant-in-error was riding, then he was entitled to recover. This was the sole issue

submitted by the charge (Rec., 25-30). Judgment for plaintiff was, on error, affirmed by United States Circuit Court of Appeals, Fifth Circuit, and the record brought here by writ of error to that court (Rec., 35-37).

The assignments of error in said court of appeals raised practically three questions for decision :

1. Was it error to permit the deposition of the defendant-in-error, who was present in court at the time, to be read in evidence, he afterwards testifying in person?

2. Was the plaintiff-in-error entitled to a peremptory instruction on the ground that the defendant-in-error, as matter of law, assumed the risk of riding in the stock car instead of the caboose, and was guilty of contributory negligence in so doing?

3. Did the court err in refusing special charges to the effect that defendant-in-error could not recover, if he would not have been hurt had he been riding in the caboose, or if the caboose was a safer place to ride in than the stock car, or if it was a safer place, and defendant-in-error knew, or was chargeable with knowledge of such fact?

The assignments of error in this court raise the same questions, except that the first would seem to have been waived (Rec., 29, 36) ; and we shall, therefore, here submit the same brief of the argument as was submitted in said court of appeals, with proper modification of references to the record.

BRIEF OF THE ARGUMENT.

I.

The action of the trial court in permitting the deposition of the witness present at the trial to be read, was a purely discretionary matter not open to review. But if it were otherwise, the witness having afterwards testified in person, subject to cross-examination, no possible injury could have resulted.

The deposition was taken before the cause was removed from the State court (Rec., 10, 6); besides, the witness resided at Beloit, Kansas, more than a hundred miles from the place of trial (Rec., 10). In *O'Connor v. Andrews*, 81 Tex., 29, it was ruled that the matter of permitting the deposition of a witness, who is present at the trial, to be read, rests with the discretion of the court, citing *Schmick v. Noel*, 64 Tex., 406. It is familiar that the Federal courts will not review on error matters resting within the discretion of the inferior courts, such as matters of practice. *Barrow v. Hill*, 13 How. (U. S.), 54; *Parsons v. Bedford*, 3 Pet. (U. S.), 434; *Sun Sheong-Kee v. The United States*, 3 Wall., 320 (L. Ed., 72).

II.

Clearly, there was no error in denying the peremptory instruction for the plaintiff-in-error, since the evidence for the defendant-in-error was abundantly sufficient to warrant the finding that he was injured through the negligence of the operatives of the train, and without contributive negligence on his own part.

It was the right and duty of the defendant-in-error, as we have seen, to give his stock the needed care and attention (Rec., 21). The court below held, in effect, that defendant-in-error's right to recover was defeated, as matter of law, by voluntary assumption of risk and contributive negligence on his part, if he was at the time giving attention to the cattle *while the train was in motion* (Rec., 25). If the train was not thus in motion at the time, manifestly there was no issue upon the evidence, based upon not riding in the caboose, of voluntary assumption of risk or contributory negligence (Rec., 10-25). Therefore, if there was evidence that the train was not in motion at the time, the refusal of the peremptory charge was unavoidable. The provision in the stock contract that defendant-in-error should be treated as an employe was ineffectual to change his real relation (*Railway Company v. Ivy*, 71 Texas, 409), which was that of a passenger so far as concerned the duty of care towards him (*Railroad Company v. Horst*, 3 Otto, 291; *Railroad v. Lockwood*, 17 Wall., 357; *Railway Company v. Garcia*, 62 Tex., 285; *Railway Company v. Aiken*, 71 Tex., 373; *Railway Company v. Cole*, 8 Tex. Civ. App., 635). The occasion of defendant-in-error's attention to his stock at the time, was the failure of duty by plaintiff-in-error to avoid abruptly throwing the stock down and injuring them (*Railway Company v. Ellison*, 70 Tex., 491). The negligence of the operatives of the train, to the injury of the defendant-in-error, while he was attending to his stock, was action-

able. Receiver's Railway Company v. Armstrong (Tex. Civ. App.), 23 S. W. Rep., 236, and cases cited. It follows that the case was one for liability, *unless the train was in motion* at the time the defendant-in-error undertook to give attention to his stock. There was a conflict of evidence on this point. One or two of the train crew testified to an admission by defendant-in-error that the train was in motion at the time (Rec., 18-20). The plaintiff-in-error, on the other hand, testified: "I never tried to get my cattle up that day while the train was in motion, and I made no such statement to the brakeman or conductor; I did not try to get them up while the train was in motion, because the trough was so narrow that I could hardly get along it, and I would wait till it stopped" (Rec., 25). In returning a verdict for the defendant-in-error, the jury necessarily, under the court's charge, found the issue of fact in his favor (Rec., 25). As said by Mr. Justice Bradley, in *Dirst v. Morris*, 14 Wall., 490, "This court, sitting as a court of error, can not pass, as it does in equity appeals, upon the weight and sufficiency of the evidence." The case then obviously comes to this, that as the verdict affirms due care on the part of defendant-in-error at the time he was hurt, there was no question of contributory negligence or voluntary assumption of risk in the case *if the train was not in motion* when defendant-in-error undertook to give his stock the needed attention, and the verdict, upon sufficient evidence, affirms that the train was not in motion at that time.

III.

The special charges were erroneous in assuming that the train was in motion, and in ignoring the defendant-in-error's right and duty to give attention to his stock when the train was not in motion. These instructions were grounded upon the theory that the train was in motion, and as the court went further, and denied recovery as matter of law, if the train was in motion, the special charges, if abstractly correct, could have served no useful purpose, and would have tended to mislead or confuse the jury.

What is said under the second proposition, *supra*, makes the way clear in this connection. It has been seen that contributory negligence and voluntary assumption of risk had no place in the case, unless the train was in motion at the time defendant-in-error undertook to give attention to his stock, as the verdict affirms due care on his part at that time. Since it was clearly the right and duty of defendant-in-error, if riding in the caboose, to go into the stock car, and there give his attention to his stock when the train was not in motion, it follows that the failure to ride in the caboose had no lawful connection with the injury; provided, the train was not in motion when defendant-in-error undertook to give his stock the needed attention. The court's charge having denied recovery if the train was in motion, the riding in the caboose no longer presented any issue of fact for the jury, and to have then qualified the charge relative to contributory negligence or voluntary assumption of risk, as based on that consideration, would have been to indulge a misleading abstraction, if not palpably erroneous. But

in respect to the exception to the charge of the court, it is enough to say that the charge was good law as far as it went, and if there was any omission, making a qualification necessary, it could only be supplied by request for special instructions (*Weaver v. Nugent*, 72 Tex., 278; *Railway v. Helm*, 64 Tex., 147; *Rost v. Railway*, 76 Tex., 172). This brings us to the special charges which were asked and refused. Each one involved the assumption of the controverted fact that the train was in motion, and ignored the right and duty of the defendant-in-error, if he had been riding in the caboose, to give needed assistance to his cattle when the train was not in motion. The charges, therefore, were not applicable to the facts of the case, were misleading in their tendency, if not positively erroneous (*Lucas v. Brooks*, 18 Wall., 436; *Greenleaf v. Birth*, 9 Pet., 292; *Knickerbocker Life Ins. Co. v. Foley*, 15 Otto, 350; *Catts v. Phalen*, 2 How., 376; *Railroad Company v. Barnell*, 8 Otto, 479). It is settled that unless a party is entitled to a special instruction in its precise terms, the court is not bound to give a modified instruction varying from the one prayed (*Catts v. Phalen*, 2 How., 376).

It is submitted that the case was well and fairly tried, and that there is not only no reversible error made apparent, but the record is singularly clear from the slightest deviation in the direction of error.

Respectfully submitted, with prayer for affirmance.

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TEXAS AND PACIFIC RAILWAY COMPANY
v. REEDER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.

No. 205. Submitted April 15, 1898 — Decided May 9, 1898.

A provision in a contract, made with a railroad company for the carriage of live stock, that the person in charge of the stock shall remain in the caboose car while the train is in motion, is not violated by his being in the car with the live stock when the train is not in motion, even though he may have been in that car instead of in the caboose car when the train was in motion; and in case of an accident happening to him, while so in the cattle car, caused by a sudden jerk made when the train was at rest, his being in the cattle car at that time, and under such circumstances, does not make him guilty of contributory negligence.

THIS was an action originally instituted by Alexander Reeder against the Texas and Pacific Railway Company in the District Court of Marion County, Texas, to recover for personal injuries sustained by Reeder. The action was afterwards removed upon petition of the defendant to the United

Statement of the Case.

States Circuit Court for the Eastern District of Texas. The facts of the case were substantially as follows:

Reeder shipped from Scottsville, Kansas, to Houston, Texas, a car loaded with an emigrant outfit, consisting of ten head of live stock and of household goods, and accompanied the same upon a drover's pass. It was provided in the contract which he entered into with the railway company, that he should "assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock" while on the way, and to better care for the stock he rode in the car with them. In the ninth paragraph of the contract it was further provided "that the person or persons in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever."

The evidence shows that it was the custom on the road of the defendant company for stockmen to ride in the caboose, but that in a case of an "emigrant outfit," like the one in question, it was not unusual for the person in charge to ride in the car with the live stock. Reeder rode with the live stock during the whole trip, and although his car was next to the caboose, and he was invited by the conductor and trainmen to ride in the caboose, he declined for the reason that it would be inconvenient for him to get in and out of the car to look after his stock.

Reeder, whose age was about seventy, testified that he had travelled about five hundred miles over connecting lines before reaching the line of the defendant company, and in that distance neither his stock nor himself had sustained any injury. He further testified that during his whole trip on the line of the defendant his stock was roughly handled by the sudden stopping and starting of the engine, and had been knocked down at least eight times, and that his complaints to the trainmen that the jerks and jolts were killing his stock did no good. He also testified that at or about the place along the line of the road where he received his injury, called